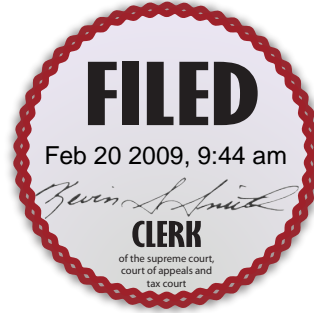


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BRIAN J. HUNT,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 09A02-0808-CR-754

APPEAL FROM THE CASS SUPERIOR COURT

The Honorable Thomas Perrone, Judge

Cause No. 09D01-0709-FD-205

February 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Brian Hunt appeals his sentence for domestic battery, a Class D felony, and interference with the reporting of a crime, a Class A misdemeanor, and his sentence enhancement based on his status as an habitual offender. On appeal, Hunt raises one issue, which we restate as whether Hunt's sentence for domestic battery and habitual offender sentence enhancement constitutes an impermissible "double enhancement" in violation of Indiana Code section 35-50-2-8(b)(1). Concluding Hunt's sentence and sentence enhancement do not constitute an impermissible double enhancement, we affirm. However, we remand sua sponte on a separate issue, instructing the trial court to correct its sentencing order to indicate that Hunt's status as a habitual offender is not an offense in itself, but merely an enhancement to his sentence for domestic battery.

Facts and Procedural History

On September 16, 2007, Hunt, his twelve-year-old son, and his son's fifteen-year-old friend, entered the home of Hunt's ex-wife, Sonja, to find her and her ten-year-old son asleep. After Sonja and her son awoke, an argument ensued between Hunt and Sonja, which culminated in Hunt striking Sonja in the face, knocking her to the ground, and breaking her cellular phone when she tried to call 911.

On September 18, 2007, the State charged Hunt with domestic battery, a Class D felony; battery, a Class D felony; and interference with the reporting of a crime, a Class A misdemeanor. On November 5, 2007, the State filed a notice seeking sentence enhancement based on Hunt's alleged status as an habitual offender. After filing a

motion to dismiss the Class D felony battery charge on the ground that it constituted an impermissible double enhancement in conjunction with the habitual offender charge, the State conceded the point and dismissed the battery charge. Hunt subsequently pled guilty to the Class D felony domestic battery charge and the Class A misdemeanor interference with the reporting of a crime charge, and also admitted he was an habitual offender. The trial court accepted Hunt's guilty pleas and admission, and sentenced him to concurrent terms of two years for the domestic battery conviction and one year for the interference with the reporting of a crime conviction, enhanced by three years based on Hunt's status as a habitual offender. Hunt now appeals.

Discussion and Decision¹

Hunt argues his domestic battery conviction and habitual offender sentence enhancement constitutes an impermissible "double enhancement." That label alludes to a provision in the habitual offender sentencing enhancement statute that prohibits the State from seeking such an enhancement if "the offense is a misdemeanor that is enhanced to a felony in the same proceeding as the habitual offender proceeding solely because the person had a prior unrelated conviction." Ind. Code § 35-50-2-8(b)(1). Hunt's domestic battery conviction falls short of this definition, however, because although it was enhanced from a misdemeanor to a felony, it was so enhanced because the State alleged and proved that Hunt knowingly committed the offense in the presence of a child less

¹ The trial court appears to have entered a judgment of conviction based on Hunt's status as a habitual offender. See Appellant's Appendix at 25 (trial court's sentencing order stating that "[t]he Defendant shall serve a sentence of 3 . . . years . . . confined in the . . . Dept. of Correction" for "Habitual Offender" as a "class D felony"); *id.* at 6 (CCS entry summarizing trial court's sentencing order). Status as a habitual offender, however, is not a separate offense, but merely a factual determination that is used to enhance the sentence of the accompanying felony. *Greer v. State*, 680 N.E.2d 526, 527 (Ind. 1997). We therefore instruct the trial court to correct its order to reflect that a judgment of conviction was entered for one count of Class D felony domestic battery and Class A misdemeanor interference with the reporting of a crime.

than sixteen years of age and that the child might have been able to see or hear the attack, see Ind. Code § 35-42-2-1.3(b)(2); appellant's appendix at 10; transcript at 39-40 (July 18, 2008, hearing), not because Hunt had a prior unrelated conviction.² That makes the cases cited by Hunt – Johnson v. State, 835 N.E.2d 492 (Ind. 2005), Jacobs v. State, 835 N.E.2d 485 (Ind. 2005), and Ross v. State, 729 N.E.2d 113 (Ind. 2000) – distinguishable because each of them involved an offense enhancement from a misdemeanor to a felony due to a prior unrelated felony conviction. See Johnson, 835 N.E.2d at 493; Jacobs, 835 N.E.2d at 486; Ross, 729 N.E.2d at 115.

Conclusion

Because Hunt's domestic battery conviction was not enhanced from a misdemeanor to a felony on the basis of a prior unrelated felony conviction, the sentence for that conviction in conjunction with a habitual offender sentence enhancement does not violate Indiana Code section 35-50-2-8(b)(1). However, we remand with instructions that the trial court correct its sentencing order to indicate that Hunt's status as a habitual offender is not an offense in itself, but merely an enhancement to his sentence for domestic battery.

Affirmed and remanded with instructions.

CRONE, J., and BROWN, J., concur.

² Interestingly, concern over double enhancement was precisely the reason the State did not challenge Hunt's motion to dismiss the battery charge, as it was elevated to a Class D felony based on an allegation that Hunt had previously been convicted of battery, see Ind. Code § 35-42-2-1.3(b)(1); appellant's app. at 12, and therefore potentially in conflict with Indiana Code section 35-50-2-8(b)(1)'s prohibition on offense level enhancements based "solely" on a prior unrelated felony conviction.